FILED
MAR 30 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1952
No. 692

JESSE M. ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

DAVID A. FALL,
1008 South Pacific Avenue,
San Pedro, California,
Attorney for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

Summary statement of matter involved 2

The basis of the court's jurisdiction 6

Questions presented 6

Reasons relied upon for the allowance of the writ 7

Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 9

Opinions of the courts below 9

Specification of errors 10

Argument 12

Point I. The Court of Appeals for the Ninth Circuit wholly misconceived the law applicable to the contract of May 27, 1944, which was merely extended by the agreement of March 14, 1945 12

Point II. Wages agreed to be paid to Allen by the United States for the duration of his disability, were earned for services performed by him from May 27, 1944 to August 14, 1947 16

Point III. Amendment to Federal Employees' Compensation Act of July 1, 1944, by Chapter 373, 58 Statute 712, does not apply to petitioner's action for wages under his contract of employment 20

Point IV. The United States of America cannot abrogate their contracts 21

Point V. Petitioner accepted compensation benefits under economic coercion 23

Conclusion 24

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alcoa S. S. Co. v. United States, 338 U. S. 421	19
Appleby v. New York, 271 U. S. 364	15
Calmar S. S. Co. v. Taylor, 303 U. S. 525	7
Canadian Aviator, Ltd. v. United States, 324 U. S. 215	19
Carlisle Packing Co. v. Sandanger, 259 U. S. 255	22
Chelentis v. Luckenbach S. S. Co., 247 U. S. 372	22
Cortes v. Baltimore Insular Line, 287 U. S. 367	8, 22
Dela Rama S. S. Co. v. United States, ... U. S. ....., 97 L. Ed. Adv. 308	21
Everett v. United States, 284 Fed. 203	19
Great Lakes Steamship Co. v. Geiger, 261 Fed. 275	8
Gritts v. Fisher, 224 U. S. 640	15
Habelhurst Oil Mill Co. v. United States, 70 Ct. Cl. 335	23
Harden v. Gordon, Fed. Case 6047	8
Hartsville Oil Mill v. United States, 271 U. S. 43	23
Henrick v. Barton, 83 U. S. 166	15
Hollerbach v. United States, 233 U. S. 165	7
Hutchings v. Low, 82 U. S. 77	15
Jentry v. United States, 73 Fed. Supp. 899	18
Jones v. Waterman S. S. Co., 130 Fed. 797	8
Louisville Bank v. Radford, 295 U. S. 555	7
Lynch v. United States, 292 U. S. 571	7, 21
Mahnich v. Southern S. S. Co., 321 U. S. 96	22
Martinez v. Matson S. S. Co., 97 F. 2d 19	8
O. F. Nelson & Co. v. United States, 149 F. 2d 692	19
O'Donnell v. Great Lakes Dredge & Dock Co., 127 F. 2d 901	8
Otis v. United States, 120 U. S. 115	19
Pacific Mail S. S. Co. v. Lucas, 264 Fed. 938	8
Perry v. United States, 294 U. S. 330	7, 21
Priebe & Sons v. United States, 322 U. S. 407	7
Seas Shipping Co. v. Sieracki, 328 U. S. 85	22
Sinking Fund Cases, 99 U. S. 700	7
Snyder v. Rosenbaum, 215 U. S. 261	24
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424	22

PAGE

Southwestern Coal Co. v. McBride, 185 U. S. 499 15
The A. Heaton, 43 Fed. 592 8
The Arizona v. Anelich, 298 U. S. 110 22
The City of Avalon, 156 F. 2d 500 16
The Hawaiian, 33 Fed. Supp. 985 8
The Osceola, 189 U. S. 158 ..... 7, 19, 22
United States v. Bryan, 13 U. S. 374 15
United States v. Central Pacific R. Co., 118 U. S. 235 ..... 7, 21
United States v. Loyola, 161 F. 2d 126 19
United States v. Northern P. R. Co., 256 U. S. 51 ..... 7, 21
United States v. Smith, 94 U. S. 214 7
United States v. Standard Rice Co., 323 U. S. 106 7
Williams v. Johnson, 239 U. S. 414 15
Wood v. Lovett, 313 U. S. 362 ..... 12, 15

MISCELLANEOUS

12 Army Transportation Corps, Marine Personnel Regulations, Sec. 32.1 17
12 Army Transportation Corps, Marine Personnel Regulations, Sec. 32.2 18
12 Army Transportation Corps, Marine Personnel Regulations, Sec. 132.5 ..... 3, 17
Executive Order 9001 ..... 4, 6, 18

STATUTES

Act of July 1, 1944 (58 Stats., Chap. 373, p. 712) 4, 5, 6, 7, 14, 20, 24
Federal Employees Compensation Act, Sec. 7 ..... 4, 5, 7
United States Code, Title 5, Sec. 757-a 20, 22, 24
United States Code, Title 28, Sec. 1254 6
United States Code, Title 46, Secs. 781-789 18
United States Code, Title 50, Sec. 611 ..... 4, 6, 18
United States Constitution, Fifth Amendment 21

TEXTBOOKS

Ames, History of Assumpsit (3 Selected Essays, Anglo-Am. Leg. Hist. 259) 18

IN THE

Supreme Court of the United States

October Term, 1952
No. .....

JESSE M. ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Jesse M. Allen, a seaman, for a Writ of Certiorari to review a decree of the Court of Appeals for the Ninth Circuit, entered on the 31st day of December, 1952, affirming a decree of dismissal of a libel to recover damages for tuberculosis caused by the unseaworthy conditions of vessels in which the United States required him to serve in the Pacific Ocean in the second World War, and to recover wages pursuant to the terms of his written contract of employment, and for maintenance, entered on the 22nd day of June, 1951, by the District Court of the United States for the Southern District of California, Central Division, respectfully shows:

Summary Statement of Matter Involved.

The Contract. Jesse M. Allen was employed by the United States of America on the 27th day of May, 1944, pursuant to a written contract of employment, to serve in the Transportation Corps as a marine employee, for a period of one year from the date of the execution of the contract, and for such further period as the parties might agree in writing. [Libelant's Ex. 3, R. 40.] The contract provided in paragraph 17 thereof, as follows:

> "The period of service covered by this contract may be extended from year to year or any part thereof upon agreement of both parties in writing prior to the completion of the one (1) year period of service under this contract, or any succeeding renewed one (1) year period or any part thereof, in which case all the conditions applying to the contract during the first year will in like manner apply to each such renewed year. In the event the Employee's designation and/or rate of pay set forth herein be changed by mutual consent of the Government and the Employee, all the other provisions of this contract herein contained shall remain valid and shall be applicable to such change or designation and/or rate of pay."

This contract further provided in paragraph 7 thereof:

> "In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity."

In paragraph 8 of this contract, it is provided:

> "The Employee shall be subject to such benefits as he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty."

Prior to the completion of one year's service under this contract, petitioner and The United States of America, on the 14th day of March, 1945, entered into an agreement in writing, supplementary to the employment of the petitioner, extending his employment for a period of *"Duration of War plus Six Months."* [Libelant's Ex. 4, R. 40.]

The modification of the 14th of March, 1945, extended the period of the Contract of May 27, 1944, and provided in paragraph 3 thereof, as follows:

> "I understand that the policy of the Government is to follow so far as may be practicable, the prevailing practice of the maritime industry with respect to employment on its vessels."

Section 12. *Army Transportation Corps. Marine Personnel Regulations*, Section 132.5, provides for sick or injured seaman as follows:

> "If the combined annual and sick leave accumulated to the credit of the seaman is not sufficient to cover the period of his illness, the employee may, nevertheless, continue to receive his basic wage plus maintenance during his period of illness or injury in conformity with prevailing maritime practice."

On August 14, 1947, petitioner became ill and went to the Aiea Naval Hospital. [R. 42.] The nature of the illness was later diagnosed as bilateral pulmonary tuberculosis, on or about December 1, 1947, while petitioner was hospitalized at the United States Marine Hospital at Fort Stanton, New Mexico.

Petitioner is still disabled by reason of his illness. The last medical report in evidence and the stipulation of February 26, 1951, indicates disability continuing. [R. 36.]

No payments of any nature were made by the United States of America to petitioner after his accumulated sick and annual leave terminated in January, 1948.

Petitioner's base pay at the time he became ill with tuberculosis while a chief engineer was $6,997.00. [Resp. Ex. A-12.]

The Election. On July 1, 1944, Congress, by c. 373, 58 Stat. 712, amended Section 7 of the F. E. C. A. of 1916, so as to provide for and to *require an election between compensation benefits and any payments or benefits otherwise available, under any other Act of Congress,* because of service as a government employee. However, The United States of America had the power to enter into and make the contract of May 27, 1944, with the petitioner, and the extension of March 14, 1945, pursuant to 50 U. S. C. 611, and Executive Order 9001.

A Compensation Order was made on July 19, 1949, rejecting petitioner's claim for compensation, but on May 26, 1950, this Order was Modified so as to grant petitioner Compensation. [Resp. Ex. A-12.]

Petitioner was not paid maintenance at any time by the United States of America. It was not until petitioner was without any money to support himself and wife that he took the compensation under the Order of May 26, 1950. [Libelant's Ex. 5, R. 41.]

The contract of employment of May 27, 1944, provided that the Employee should receive his basic wage during the period of his disability, and in the following paragraph it further provided for F. E. C. A. benefits. [Libelant's Ex. 3.]

Respondent contends that the acceptance of the benefits under the F. E. C. A. *discharged* the United States

of America from its contractual obligation under paragraph 7 of the contract of May 26, 1944, *to pay base wages during the period of his incapacity.*

The District Court held that the contract of March 14, 1945, was a new contract. [R. 21.] Petitioner contends that such agreement *merely extended* the Contract of May 27, 1944, from one year from May 27, 1944, *for the Duration of War Plus Six Months.*

The Court of Appeals held that the Amendment of the F. E. C. A. by Congress on July 1, 1944 (c. 373, 58 Stat. 712) became a part of the modification of March 14, 1945, and a part of the Contract of May 27, 1944, between petitioner and The United States of America. [R. 44.]

The Constitutional Question. Petitioner has asserted in both Courts below that the United States of America could not abrogate its contract with the petitioner by requiring him to elect one of the benefits under his contract in lieu of all of the benefits provided for therein.

The Court of Appeals below, held that the petitioner was barred by the provisions of Section 7 of the F. E. C. A. from receiving any salary, pay, or remuneration whatsoever, except in return for *services actually performed.* [R. 43, 44.]

If petitioner must elect to receive, and by such election is deprived of the remaining benefits to which he became entitled to receive for his services rendered under his contract of employment with the United States of America, then those laws, so providing, are *unconstitutional* as to this petitioner, as a deprivation of property wtihout due process of law, and an abrogation by the United States of America of its contractual obilgations. This is especially so because petitioner had performed all of his con-

tractual obligations, and seeks to have the United States of America perform *all* of its contractual obligations provided in such contract.

The Basis of the Court's Jurisdiction.

The jurisdiction of this Court is based upon Section 1254 of Title 28, U. S. C.

The date of the judgment sought to be reviewed is December 31, 1952. [R. 42.]

The Federal Statutes construed by the Court below, which construction is claimed to be in error by this petitioner, are c. 373, 58 Stat. 712; Section 7 of the F. E. C. A. of 1916; and 50 U. S. C. 611, together with Executive Order 9001.

Questions Presented.

1. Was there a correct interpretation by the Court of Appeals as to the contractual obligations of the United States of America under the Contract of May 27, 1944 [Libelant's Ex. 3], as extended by the modification of March 14, 1945? [Libelant's Ex. 4.]

2. Was petitioner required to elect to receive one of the benefits of his contract in lieu of all of the benefits the respondent became obligated to pay pursuant to its contract in writing, when such benefits were not payable to petitioner because of any other Act of Congress?

3(a) If the Act of Congress of July 1, 1944, c. 373, 58 Stat. 712, applies to petitioner, is it unconstitutional?

(b) Did the United States bind itself to pay petitioner all of the benefits under its contract with petitioner?

4. Did the Court of Appeals correctly interpret the benefits to which petitioner became entitled under his contract of May 27, 1944?

Reasons Relied Upon for the Allowance of the Writ.

1. The Court of Appeals has decided an important question involving the construction of Federal Statutes, Section 7 of the F. E. C. A. of 1916, and c. 373, 58 Stat. 712, in a manner which is vitally important in the field of Maritime law and in the employment of seamen.

2. The Court of Appeals has decided a question of the contractual liability of the United States of America in a manner which permits the United States of America to abrogate its contractual obligations, in direct conflict with the decisions of this Court.

Lynch v. United States, 292 U. S. 571, 577;

Sinking Fund Cases, 99 U. S. 700, 719;

United States v. Smith, 94 U. S. 214, 217;

Priebe & Sons v. United States, 322 U. S. 407;

United States v. Standard Rice Co., 323 U. S. 106;

Hollerbach v. United States, 233 U. S. 165;

United States v. Central Pacific R. Co., 118 U. S. 235;

United States v. Northern P. R. Co., 256 U. S. 51;

Louisville Bank v. Radford, 295 U. S. 555;

Perry v. United States, 294 U. S. 330.

3. The Court of Appeals has decided an important question affecting the maritime rights of seamen employed by the United States of America under written contracts, so as to deprive them of maintenance and wages to the termination of their employment in conformity with the well settled maritime practice, and contrary to the uniform and well settled decisions of this Court in

The Osceola, 189 U. S. 158, 175;

Calmar S. S. Co. v. Taylor, 303 U. S. 525;

Cortes v. Baltimore Insular Line, 287 U. S. 367;

Harden v. Gordon, Fed. Case 6047, not from this Court, but outstanding.

and in direct conflict with the decisions of the Courts of the following Circuits dealing with seamen's cases:

FIRST CIRCUIT—
The A. Heaton, 43 Fed. 592, 595;

THIRD CIRCUIT—
Jones v. Waterman S. S. Co., 130 Fed. 797, 798;

FIFTH CIRCUIT—
Martinez v. Matson S. S. Co., 97 F. 2d 19, 20;

SIXTH CIRCUIT—
Great Lakes Steamship Co. v. Geiger, 261 Fed. 275, 277, 278;

SEVENTH CIRCUIT—
O'Donnell v. Great Lakes Dredge & Dock Co., 127 F. 2d 901, 902;

NINTH CIRCUIT—
Pacific Mail S. S. Co. v. Lucas, 264 Fed. 938, 941.

and the following District Court:

D. C., Md.—
The Hawaiian, 33 Fed. Supp. 985, 986.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit should be granted.

DAVID A. FALL,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

JESSE M. ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions of the Courts Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported in 201 F. 2d 263, and is printed in the record. [R. 42.]

The written opinion of the District Court for the Southern District of California, Central Division, has not been officially reported, but is printed in the record [R. 20] and findings of fact and conclusions of law of the District Court are printed in the record. [R. 21.]

Specification of Errors.

(1) The Court of Appeals for the Ninth Circuit erred in making the following ruling:

> "B. As to Allen's claim for wages during disability, it is based on provisions of his first contract of employment which Allen claims were embodied in a second contract of employment of date March 14, 1945. We do not have to pass on the question whether the second contract contained the provisions of the first, for if it does they constitute no claim for payment of wages during disability."

(2) The Court of Appeals for the Ninth Circuit erred in making the following ruling:

> "These provisions of the Act (referring to 'Sec. 7). That as long as the employee is in receipt of compensation under this Act, or, if he had been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever *except in return for services actually performed,* and except pensions for service in the Army or Navy of the United States.' (Emphasis supplied.) (fol. 79.) These provisions of the Act are as much a part of Allen's contract with the government as if they were written in it."

(3) The Court of Appeals for the Ninth Circuit erred in making the following ruling:

> "By choosing to accept the award of disability payments under Section 7 of the Employees' Compensa-

tion Act, Allen deprived himself of any wage payments during his disability—that is during a period when there were no 'services actually performed' by him."

(4) The Court of Appeals for the Ninth Circuit erred in making the following ruling:

"Further assuming that clauses 7 and 8 are in the second contract of employment of March 14, 1945, that contract was preceded by the Act of July 1, 1944, c. 373, 58 Stat. 712, amending Section 7 of the original Compensation Act so as to require election between compensation benefits or benefits otherwise available."

(5) The Court of Appeals for the Ninth Circuit erred in making the following ruling:

"The provisions of this Act are as much a part of the March 14, 1945 contract as if repeated therein." (Referring to the amendment of July 1, 1944.)

(6) The Court of Appeals for the Ninth Circuit erred in making the following ruling:

"We regard as frivolous Allen's contention that (fol. 80) he was coerced by the need of money to make this election . . ."

ARGUMENT.

POINT I.

The Court of Appeals for the Ninth Circuit Wholly Misconceived the Law Applicable to the Contract of May 27, 1944, Which Was Merely Extended by the Agreement of March 14, 1945.

As we see it, the foremost error of the Court of Appeals lies in its interpretation as to what laws become a part of the contract of May 27, 1944, as extended by the agreement of March 14, 1945.

In *Wood v. Lovett,* 313 U. S. 362, 369, 370, the court said:

> "The federal and state courts have held with unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at a tax sale, accruing to him under the laws in force at the time of his purchase, is void as impairing the obligation of contract."

The Court continued:

> ". . . But 'the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

To reconstruct then, the facts and circumstances as to the contract of May 27, 1944, and its extension, it appears more clearly wherein the Court erred.

The contract of May 27, 1944 [Libelant's Ex. 3] provided:

> "17. The period of service covered by this contract may be extended from year to year or any part thereof upon agreement of both parties in writing *prior* to the completion of one (1) year of service under this contract, or any succeeding renewed one (1) year period or any part thereof, in which case all the conditions applying to the contract during the first year will in like manner apply to each such renewed year." (Emphasis supplied.)

Prior to the expiration of one year, and while this contract of May 27, 1944, was still in full force and effect, it was extended by an agreement in writing, executed by Allen and The United States, by its representative. [Libelant's Ex. 4.] It was extended "for a period of *Duration of War Plus Six Months.*"

The contract of May 27, 1944, in Section 7, provided in part, as follows:

> *"In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity."* (Emphasis supplied.)

The next portion of the contract, Section 8, provided:

> "8. The Employee shall be subject to such benefits as he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while in the performance of his duty."

Congress, on July 1, 1944, after the execution of the contract of employment of May 27, 1944, by c. 373, 58 Stat| 712, amended the F. E. C. A. of September 7, 1916, so as to provide:

> "That whenever any person is entitled under this Act (F. E. C. A.) by reason of his injury or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death, *under any other Act of Congress,* because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive."

Allen did not contend that the provisions of the contract of May 27, 1944 [Libelant's Ex. 3] were embodied in the modification agreement of March 14, 1945 [Libelant's Ex. 4.] Allen always has contended that the first contract was extended for the Duration of War Plus Six Months, and all of the provisions therein remained in force, except as modified by the agreement of March 14, 1945. The modification was as to the term of the contract for the *Duration of War Plus Six Months,* instead of from year to year or any portion thereof, providing such extentions were made while the contract was in full force and effect.

This Court has decided with unanimity that the law in existence at the time of the execution of the contract,

and not subsequent thereto, becomes a part of the contract.

Wood v. Lovett, 313 U. S. 362;
Pennoyer v. McConnaughy, 140 U. S. 1;
Appleby v. New York, 271 U. S. 364.

Likewise, this court has held with unanimity, that if a statute would impair the obligation of contract or interfere with existing vested rights, it will not be construed to operate retroactively.

Southwestern Coal Co. v. McBride, 185 U. S. 499, 503, 504;
United States v. Bryan, 13 U. S. 374, 385.

There is no room for question that vested rights are protected by Article I, Section 10 of the Constitution, and that an impairment of those rights by a subsequent statute is prohibited.

Gritts v. Fisher, 224 U. S. 640, 646, 647, 648;
Hutchings v. Low, 82 U. S. 77;
Williams v. Johnson, 239 U. S. 414;
Henrick v. Barton, 83 U. S. 166.

We have exhaustively researched the authorities, but are unable to find one reported case, or statement by any text writer, supporting the position of the Court of Appeals that the Act of July 1, 1944, became a part of the contract of May 27, 1944, because of the modification of March 14, 1945, extending the term of the contract.

POINT II.

Wages Agreed to Be Paid to Allen by the United States for the Duration of His Disability, Were Earned for Services Performed by Him From May 27, 1944 to August 14, 1947.

The Court of Appeals for the Ninth Circuit, in *The City of Avalon,* 156 F. 2d 500, 501, ruled upon the nature of wages paid to a seaman after he was disabled and left his ship. In that case it was contended that the wages paid to a seaman during his disability were not subject to Social Security deductions, because the seaman rendered no service therefor. The Court held:

> "Appellant contends that because he ceased employment before the amount of the additional compensation could be determined, it was not earned while he was an employee of the vessel owner and hence was not wages. There is no merit to this contention. The added amount was earned by his employment up to the day of his disability. It was then a fixed obligation of the employer, though undetermined in amount."

The court further held that this was remuneration for services performed up to the time he left his ship. This is exactly the situation we have before us at the present time.

The modification agreement of March 14, 1945, is explanatory of the contemplated payments due to Allen in the event of illness or injury sustained during his employ-

ment. Paragraph 2 of the Modification Agreement [Libelant's Ex. 4] provides as follows:

> "I understand that the policy of the Government is to follow, so far as may be practicable the prevailing practice of the maritime industry with respect to employment on vessels."

12. Army Transportation Corps, Marine Personnel Regulations, Section 132.5, provides as follows:

> "If a civilian seaman sustains injury or illness, the time that he is physically incapacitated from active duty will be charged to his accumulated sick leave. If the amount of accumulated sick leave is not sufficient to cover the period of his illness or injury, annual leave will be charged against such period of incapacitation. *If the combined annual and sick leave accumulated to the credit of the seaman is not sufficient to cover the period of illness, the employee may, nevertheless, continue to receive his basic wage plus maintenance during his period of illness or injury in conformity with prevailing maritime practice.*"

Section 32.1 of 12 Army Transportation Corps, Marine Personnel Regulations, provides for the employment of seaman. In addition thereto it provides:

> "Seamen employed under Agreement of Enrollment or an Individual Employment Contract will not be required to sign Shipping Articles in addition thereto. In such cases where Individual Employment Contracts or Agreements of Enrollment are utilized, such agreements or contracts will be in lieu of Shipping Articles."

Thus it is apparent that the Army Transportation Corps, under and pursuant to their Marine Personnel Regula-

tions, sought to apply the general admiralty law benefits to seamen, and the term of the seaman's employment was determined either by Shipping Articles or by his Contract of Employment.

Section 32.2 of the same Regulations provides for men who are assigned for overseas duty, in part, as follows:

> "The terms and conditions of such individual contracts will govern the conditions of employment."

This is specifically applicable to petitioner.

Both the contract of employment and applicable Marine Personnel Regulations of the Army Transportation Corps provide for the payment of base wages to a sick or injured seaman during the period of disability.

The Contract of employment of Jesse M. Allen by the United States of America, was executed by the government pursuant to 50 War App. U. S. Code 611, and Executive Order 9001.

Both of these were passed and issued subsequent to the enactment of the F. E. C. A. of September 1916. The Public Vessels Act, 1925, 46 U. S. Code 781-789 carried the consent of the United States to be sued in such case as is now before this Court.

Jentry v. United States, 73 Fed. Supp. 899, 902.

In the *Jentry* case, *supra,* the court held that the Public Vessels Act gave consent to sue the United States for breach of contract, citing:

> Ames, History of Assumpsit (3 Selected Essays Anglo-Am. Leg. Hist. 259);

O. F. Nelson & Co. v. United States, 149 F. 2d 692, 698, 699;

United States v. Loyola, 161 F. 2d 126;

Canadian Aviator, Ltd. v. United States, 324 U. S. 215;

Everett v. United States, 284 Fed. 203.

Certainly the United States intended the petitioner herein to rely upon the benefits contained in the contract of employment, and should be estopped from denying liability therefore, especially in view of the fact that the contract has been fully performed upon the part of petitioner. Thousand upon thousand of our American seamen are waiting to see if the United States of America is able to extricate itself from the contractual obligations it made to seamen employed by the Army Transportation Corps. It is of special interest due to the fact that the contract the United States of America made with the seamen included in it only the basic rights to which seamen have been entitled since the earliest American ships sailed the sea. The contract included those basic rights a seaman had at the time this Court decided *The Osceola,* 189 U. S. 158. Now the United States of America seeks to extricate itself even from those rights this Court has consistently held seamen to be entitled.

This court has uniformly recognized that a contract shall be strictly construed against its draftsman.

Alcoa S. S. Co. v. United States, 338 U. S. 421, 424;

Otis v. United States, 120 U. S. 115.

POINT III.

Amendment to Federal Employees' Compensation Act of July 1, 1944, by Chapter 373, 58 Statute 712, Does Not Apply to Petitioner's Action for Wages Under His Contract of Employment.

A precise reading of the amendment of July 1, 1944, c. 373, 58 Stat. 712, conclusively establishes that the claim of petitioner Jesse M. Allen for wages, does not come within the causes of action waived by electing to take of benefits of the F. E. C. A. On July 1, 1944, 5 U. S. C. 757-a was amended so as to provide:

> "Whenever any person is entitled to receive any benefits under . . . this title by reason of his injury . . . and is also entitled to receive from the United States any payments or benefits . . . by reason of such injury or death *under any other Act of Congress,* because of service by him . . . such person shall elect which benefits he shall receive." (Emphasis added.)

Petitioner Jesse M. Allen seeks to recover wages under a written contract with the Untied States of America. He is not seeking to recover any payments or benefits *"under any other Act of Congress"* as is set forth in the amendment to 5 U. S. C. 757-a.

The principal question before this Court is whether Allen is entitled to recover *all* of the benefits provided by his written contract of employment.

POINT IV.

The United States of America Cannot Abrogate Their Contracts.

The interest of the petitioner Jesse M. Allen in each of the contractual obligations of Respondent was a vested interest, just as much as the interest of Lynch in his War Risk Insurance. In *Lynch v. United States,* 292 U. S. 571, 577, this Court held that War Risk Policies, being contracts are property and create vested rights.

Once the right in the petitioner is vested, the United States of America cannot repudiate their contract. In *Lynch v. United States, supra,* this court said:

> "To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or Municipality or citizen."

Perry v. United States, 294 U. S. 330;

Dela Rama S. S. Co. v. United States, ... U. S. ....., 97 L. Ed. Adv. 308.

Rights arising out of contracts with the United States are protected by the Fifth Amendment.

United States v. Central P. R. Co., 118 U. S. 235, 238;

United States v. Northern P. R. Co., 256 U. S. 51;

Lynch v. United States, supra.

It is of the greatest significance that the obligation of the shipowner to furnish a seaman with a seaworthy vessel is a *contractual obligation.* This Court has so held consistently.

The Osceola, 189 U. S. 158, 175;

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 381;

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 258;

Cortes v. Baltimore Insular Line, 287 U. S. 367, 371;

The Arizona v. Anelich, 298 U. S. 110, 120, 121;

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 429;

Mahnich v. Southern S. S. Co., 321 U. S. 96, 101;

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90.

The obligation to furnish a seaworthy vessel, being a contractual obligation, by what means can Congress abrogate the contractual obligation of the United States of America to furnish a seaworthy vessel? The petitioner, herein, commenced his employment prior to the Congressional amendment to 5 U. S. C. 757a. In view of the decisions hereinabove set forth, how can Congress now say that a seaman cannot recover *all* of his contractual obligations from the United States of America? Does the Congress of the United States, under the guise of economy, say to seamen working for the United States:

> "In event of injury you are not entitled to receive from your employer the ancient rights of a seaman to maintenance and cure! You are not entitled to

receive from your employer the ancient right of a seaman to collect his wages to the end of his period of employment! You are not entitled to receive from your employer a seaworthy vessel, or damages for the breach of this contract to furnish a seaworthy vessel! However we will pay to you a sum less than the maintenance to which seamen are entitled, in lieu of all of the contractual obligations of the United States."

Present contracts between employers and seamen provide $8.00 a day maintenance. As much as $15.00 per day is paid for sustenance of men employed as Chief Engineers.

POINT V.

Petitioner Accepted Compensation Benefits Under Economic Coercion.

The undisputed evidence as to the conditions under which petitioner signed the election in order to obtain compensation under F. E. C. A. was that he

> "was without funds with which to live upon and support his wife and was forced thereby to take the funds awarded him under his claim for compensation under the F. E. C. A. for tuberculosis that he suffered as the result of his employment with the United States Army Transport service. This Libelant has been unable to work since he was taken to the hospital suffering from what later was discovered to be Tuberculosis, in the fall of 1947." [Libelant's Ex. 5.]

Coercion sufficient to avoid a contract may be social or economic pressure illegally or immorally applied.

Hartsville Oil Mill v. United States, 271 U. S. 43;

Habelhurst Oil Mill Co. v. United States, 70 Ct. Cl. 335.

Economic duress is recognized as the basis for invalidating contracts.

Snyder v. Rosenbaum, 215 U. S. 261.

Conclusion.

We respectfully submit that the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decisions of this Honorable Court, and has misinterpreted the Congressional enactment of July 1, 1944, c. 373, 58 Stat. 712, 5 U. S. C. 757a in such a manner as to permit an abrogation of contracts by the United States of America; that the misapplication of the law by the United States Court of Appeals is of extreme importance to all seamen employed by the United States of America; and that the writ of certiorari should be granted in this case in order that the questions presented herein may be clarified and settled by this Honorable Court.

Respectfully submitted,

DAVID A. FALL,

Attorney for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument	7
Conclusion	11

CITATIONS

Cases:

Abilene Nat. Bank v. *Dolley*, 228 U. S. 1	9
Antoni v. *Greenhow*, 107 U. S. 769	9
Armour Packing Co. v. *United States*, 209 U. S. 56	9
Dahn v. *Davis*, 258 U. S. 421	10
Farmers Bank v. *Fed. Reserve Bank*, 262 U. S. 649	9
Gibbs v. *United States*, 94 F. Supp. 586, affirmed, 200 F. 2d 197	10
Johansen v. *United States*, 343 U. S. 427	10
Phalen v. *United States*, 32 F. 2d 687	11
Russell Co. v. *United States*, 261 U. S. 514	9
Sgambati v. *United States*, 75 F. Supp. 18, affirmed, 172 F. 2d 297, certiorari denied, 337 U. S. 938	11
United States v. *Memphis Cotton Oil Co.*, 288 U. S. 62	11
Von Hoffman v. *City of Quincy*, 4 Wall. 535	9
Walker v. *Whitehead*, 16 Wall. 314	9
Wood v. *Lovett*, 313 U. S. 362	9

Statutes:

Act of July 1, 1944, c. 373, 58 Stat. 712, amending Sec. 7 of the Employees' Compensation Act: Section 605(a)	3
Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742:	
Section 1	2
Section 7	2
Public Vessels Act, 1925, 46 U.S.C. 781, *et seq.*	5, 11
Suits in Admiralty Act. (46 U.S.C. 745)	11

Miscellaneous:

Army Transportation Corps, Marine Personnel Regulations, Par. 163.2	8

In the Supreme Court of the United States

October Term, 1952

No. 692

JESSE M. ALLEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of California (R. 20-24) is reported at 1951 A.M.C. 1316. The opinion of the Court of Appeals for the Ninth Circuit (R. 42-45) is reported at 201 F. 2d 263, 1953 A.M.C. 344.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1952 (R. 45). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the special circumstances of this case, a seaman who has continued to accept disability payments under the Federal Employees' Compensation Act, as amended July 1, 1944, under an "agreement of enrollment" entered into on March 14, 1945, may disregard his irrevocable election of benefits under that Act so as to enable him to attempt to recover wages under the provisions of an earlier contract.

STATUTE INVOLVED

The Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742, as originally enacted and effective at all times here involved, provides in pertinent part:

> Sec. 1. That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *.
>
> * * *
>
> Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in

return for services actually performed, and except pensions for service in the Army or Navy of the United States.

The Act of July 1, 1944, c. 373, 58 Stat. 712, amending Section 7 of the Federal Employees' Compensation Act, provides:

> Sec. 605(a). Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U.S.C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding the following: *"Provided,* That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and

when made shall be irrevocable unless otherwise provided by law.

STATEMENT

Petitioner was a civil service employee of the Army who served on various Army Transport vessels in different capacities up to the final rating of Chief Engineer. He was first employed under a renewable one-year written employment contract entered into on May 27, 1944, effective that day. On March 14, 1945, he entered into a new contract entitled "agreement of enrollment" (R. 1, 27), as a permanent civil service employee of the Army Transport service. Clause 7 of the first contract provided for straight wages during disability.[1] Clause 8 provided that "the Employee shall be subject to the benefits as he may be entitled to under the United States Employees' Compensation Act of September 7, 1916, as amended, for injury sustained while on the performance of his duty."

Petitioner was first assigned to the FS 411 on May 26, 1946, and served on that ship until July 8, 1947 (R. 1-2). During that service, he allegedly de-

[1] "In the event of illness or injury occasioned by his employment but not due to the Employee's misconduct, the base wages of the Employee will continue during the period of such incapacity."

Clause 7 continued: "Any such payments made shall be deemed payments on account of or in full, as the case may be, of any other compensation for sick leave to which the Employee might be entitled on account of such injury or illness" (R. 4).

veloped tuberculosis as a result of conditions on the FS 411. On July 8, 1947, he was discharged from his last voyage. Thereafter, he was returned to the continental United States. On October 9, 1947, his employment was terminated and his pay stopped. On July 26, 1948, he filed a claim for compensation under the Federal Employees' Compensation Act. On October 14, 1949, he brought his original libel under the Public Vessels Act, 1925 (46 U.S.C. 781 *et seq.*) (R. 27-30) in two counts, (1) for damages because of unseaworthiness, and (2) for maintenance money. On November 8, 1949, he filed an amended libel, adding an entirely new count, (3) for damages for breach of an alleged written contract to pay him full wages after discharge until his complete recovery.

On May 26, 1950, the Compensation Bureau awarded petitioner compensation at the rate of $89.71 a week upon his claim of July 26, 1948 (R. 35). In view of his pending suit in the district court, the award was conditioned, pursuant to the Act of July 1, 1944 (*supra,* pp. 3-4), upon petitioner's execution of an election to accept the benefits so awarded in place of the wage payments and other benefits he was claiming in his pending suit. On July 21, 1950, he executed in writing the required election. This election stated that he elected benefits under the Federal Employees' Compensation Act, as amended, "in place of any benefits (other than the proceeds of any insurance pol-

icy) under any other Act of Congress, including the Public Vessels Act, Suits in Admiralty Act, the Federal Tort Claims Act." Thereafter, on August 4, 1950, an initial check for $6,486.87 accrued compensation was issued to him and checks for $391.12 have continued to issue to him each four weeks until the present time.

Petitioner did not, however, voluntarily dismiss this suit, as his election required. The United States, therefore, moved to dismiss the libel and the district court granted the motion on the ground that petitioner's election to accept the Compensation Act benefits in place of any others barred the present action (R. 20-24).

On appeal, the Court of Appeals for the Ninth Circuit unanimously affirmed. It held that even if the provisions of the 1944 contract were carried over into the agreement of enrollment of March 14, 1945, the provisions of the Compensation Act were part of the petitioner's contract of employment. Consequently, petitioner's acceptance of benefits under Section 7 of the Act precluded wage payments during his disability, a period in which there were no "services actually performed." The court further held that the amendment of the Compensation Act by the Act of July 1, 1944, preceded and entered into the employment contract and required the petitioner to elect between compensation benefits and other payments or benefits otherwise available. The Court of Appeals rejected, as frivolous, the contention that because of peti-

tioner's need, he might retain the award and recover base wages during his illness (R. 42-45).

ARGUMENT

There is no conflict of decisions and the case is without general importance. Indeed, the case is unique in that it involves the interpretation of a special form of contract temporarily used in the Southwest Pacific theater during the last war. No similar case has ever been decided by the lower courts and no other case involving this contract or other similar forms of contract formerly used in other theaters is pending. We are advised that no similar form of contract is in use at the present time.

Petitioner's principal contention is that his right to recover is based upon the original May 27, 1944, contract. He did not, however, join the FS 411 until May 26, 1946 (R. 1-2), long after the original May 27, 1944, contract had been superseded by the enrollment agreement of March 14, 1945, and long after the original contract's one year life had expired.[2] Petitioner

[2] Clause 1 provided that the contract would run "for a period of one year from the effective date of this contract * * *".

Clause 17 provided that "The period of service covered by this contract may be extended from year to year or any part thereof upon agreement of both parties in writing prior to the completion of the one (1) year period of service under this contract, or any succeeding renewed one (1) year period or any part thereof, in which case all the conditions applying to the contract during the first year will in like manner apply to each such renewed year."

himself alleges that he became ill with tuberculosis as a result of conditions on the FS 411 (R. 1-2). At that time the terms of his employment were regulated by the enrollment agreement of March 14, 1945. Under that agreement, petitioner enrolled "in accord with the conditions prescribed by law and regulations pertinent to such service * * *." He agreed that "if the Government should exercise its right to relieve me prior to the conclusion of this term of enrollment for whatever reason, I may be disenrolled and my employment terminated at the pleasure of the Government and under such circumstances I shall have no further right or claim against the Government whatsoever, except as may be provided by law or regulations now or hereafter to be established." The Army Transportation Corps, Marine Personnel Regulations, par. 163.2, specifically provided that in the case of injury or illness not occasioned by the seaman's own delinquency or misconduct, "he will be entitled to payment of his base wages until the conclusion of the voyage, had he continued to serve upon the vessel, or until he returns to the continental limits of the United States, whichever is sooner, in conformity with prevailing maritime practice." Petitioner's voyage ended on July 8, 1947; he was returned to the United States, and thereafter his employment was terminated on October 9, 1947; and he was paid his wages, together with accrued sick and annual

leave. Under his enrollment agreement petitioner was entitled to recover no more.

Petitioner claims that the enrollment agreement of 1945 was merely an extension of the 1944 contract. Even if this were so, petitioner could not recover (*infra*, pp. 10, 11). But the fact is, as the district court found (R. 21), that the 1944 agreement had been superseded by the 1945 enrollment agreement, and the 1944 contract required a written renewal, which was never executed. Moreover, the 1945 agreement, which was self-sufficient, did not purport to be a renewal. Significantly, petitioner's own libel and amended libel both refer to the 1945 contract as a "new contract" (R. 1, 27).

The Federal Employees' Compensation Act, as amended July 1, 1944, entered into the enrollment agreement of March 14, 1945.[3] According to its terms, petitioner was required to elect whether he would sue under that Act or attempt to recover under a different Act. Its operation was entirely prospective, so that no question of the constitutionality of a retroactive application or abrogation of rights can be presented (cf. *Abilene National Bank* v. *Dolley*, 228 U. S. 1, 5), even if petitioner had had to relinquish alterna-

---

[3] *Wood* v. *Lovett*, 313 U. S. 362, 370; *Farmers Bank* v. *Fed. Reserve Bank*, 262 U. S. 649, 660; *Russell Co.* v. *United States*, 261 U. S. 514, 524; *Abilene Nat. Bank* v. *Dolley*, 228 U. S. 1, 5; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; *Antoni* v. *Greenhow*, 107 U. S. 769, 774; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550.

tive rights in consequence of an election. In fact, however, petitioner has not had to forego any wage claim, since he has been fully compensated.

Even if the 1944 contract alone were to be considered the source of petitioner's libel, he is in no better position. For the Federal Employees' Compensation Act, which was specifically incorporated into and became a part of the earlier contract,[4] prohibited receipt of remuneration "except in return for services actually performed" while receiving compensation under the Act. See the opinion of the court below, R. 44; see also *Johansen* v. *United States,* 343 U. S. 427; *Dahn* v. *Davis,* 258 U.S. 421; *Gibbs* v. *United States,* 94 F. Supp. 586 (N.D. Cal.), affirmed, 200 F. 2d 197 (C.A. 9).[5]

Petitioner's suggestion that his irrevocable election was brought about by duress is untenable. The district court specifically found that there was no duress (R. 22), and Congress, in deliberately requiring an election and prohibiting recovery of wages, clearly understood that one of the important factors entering into such an election would be economic pressure on the injured person.

---

[4] Clause 8 of the 1944 agreement, providing that the employee should be *subject* to the benefits of the Act, recognized that the benefits were accompanied by conditions.

[5] The petitioner also erroneously assumes that the provision in the 1944 contract—that "the base wages of the Employee will continue during the period of such incapacity"—had the effect of *continuing* wages beyond the contract period or any renewal thereof and beyond the termination of the employment, for no incapacity by March 14, 1945, or within one year of May 27, 1944, is alleged.

In any event, petitioner's employment was terminated on October 9, 1947, and he failed to file suit until October 14, 1949, or to claim wages allegedly due under a special contract, until the amended libel of November 8, 1949.[6] His claim is therefore barred by the two year statute of limitations of the Suits in Admiralty Act (46 U.S.C. 745), made applicable to this suit under the Public Vessels Act by 46 U.S.C. 782. *Phalen* v. *United States,* 32 F. 2d 687 (C.A. 2); *Sgambati* v. *United States,* 75 F. Supp. 18 (S.D. N.Y.), affirmed, 172 F. 2d 297 (C.A. 2), certiorari denied, 337 U. S. 938.

CONCLUSION

The decision below is correct. There exists no conflict of decisions. It is accordingly submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

PAUL A. SWEENEY,
HUBERT H. MARGOLIES,
Attorneys.

MAY, 1953

---

[6] Since the claim was entirely different, the amendment did not relate back to October 14, 1949, the date of the original bill. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—252061/P.O.1541